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## ABSTRACT

This document is a brief discussion, in outline form, regarding the legal representation of the school board and the superintendent. Specifically, the school lawyer ordinarily represents the board rather than an individual employee such as the district superintendent. Exceptions to this rule, conflicts of interest, and disclosure matters are outlined. Some situations that the school lawyer should avoid include preparation of the superintendent's employment contract, evaluation of the superintendent, and criticism policies or contract clauses. (KM)

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SCHOOL LAWYERS REPRESENT THE SCHOOL BOARD, NOT THE SUPERINTENDENT

Presentation before the Annual Meeting of the Oregon School Boards Association, Portland, OR, November 10-12, 1989.

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SCHOOL LAWYERS REPRESENT THE SCHOOL BOARD, NOT THE SUPERINTENDENT

A. WHO HAS THE ATTORNEY-CLIENT RELATIONSHIP?

1. Ordinarily the client is the employer, school board, not any individual employee.

- a. EC 5-18 Model Code of Professional Responsibility (1980) provides:

"A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to the stockholder, director, officer, employee, representative, or other person connected with the entity."

B. TROUBLESOME EXCEPTIONS TO THE RULE.

1. What if a lawyer expressly undertakes to represent the employer and the superintendent or both?
2. Courts find that the attorney-client relationship exists whenever a person who consults a lawyer could reasonably believe that such person is entitled to look to the lawyer for advice. In re Mettler, 305 Or 12, 18 (1988).

- a. OEC Rule 503 (1)(a) defines a client as someone who has rendered legal services or who consults a lawyer with a view to obtaining professional legal services.

3. What if a lawyer should have known that a school employee was going to rely on the attorney's advice in a legal matter that is personal to the employee?

- a. The mere offering of legal advice can create an attorney-client relationship.

C. CONFLICTS OF INTEREST (DR 5-105)

1. Under the disciplinary rules an "actual conflict of interest" exists when the lawyer must contend for one client that which the lawyer must oppose for another. A "likely" conflict of interest, involves

the personal business or property interest that is adverse. Where there is an actual conflict between current clients, the disciplinary rules prohibit an attorney from proceeding to represent both parties, even with a full disclosure and consent. DR 5-105 (E). Where a likely conflict exists, a lawyer may proceed only if all clients consent after a full disclosure. This does permit a lawyer to clearly oppose the interest of a current client on an unrelated matter, only if the disclosure includes a written recommendation that the client seek independent legal advice to determine if consent should be given.

D. FORMER CLIENT CONFLICTS

1. If you have treated the superintendent, or other employee, as your client for any matters, you will have to comply with the former client conflicts' requirements. It is not clear in Oregon how "matter specific" items must be. There is always a fact relationship as to whether confidential information could or would be harmful to the client. DR 5-105 (D) expressly provides for a waiver of former client conflicts.

E. WHAT ABOUT A QUESTIONABLE DIRECTIVE FROM MANAGEMENT?

1. Before any lawyer for the school district could follow a questionable directive that puts at issue the best interests of the school district, the lawyer may have to first determine if the directive conflicts with the interest of the school district. If so, the lawyer must withdraw or take other action to protect the school district. 68 Or. L. Rev. 18 (1989).
2. At the extreme, the attorneys' obligation to assess and protect the school district's interest could put the attorney in the difficult position of routinely second-guessing management's policy decisions. On the other hand, if there is no duty in that respect, the lawyer effectively becomes the counsel to the controlling managers of the school district.

3. Generally, the solution is that the lawyer accepts the management policy decisions even if they appear unwise, and must take action if management is engaging in a violation of law that is likely to injure the district. Model Code of Professional Responsibility Rule 1.13. Comment.

F. DISCLOSURE - WITHDRAWAL AND OTHER ACTION

1. The Model Rules of Professional Responsibility, Rule 1.13 (b) pose a general obligation on lawyers to "proceed as is reasonably necessary in the best interest of the organization" when they learn that officers are planning or engaging in violations of law that could substantially injure the organization.
2. The Model Rules authorize a lawyer to disclose the matter to higher authority in the organization including, if warranted by the seriousness of the matter, "referral to the highest authority that can act on behalf of the organization as determined by applicable law". ABA Committee on Professional Ethics and Grievances, Formal Opinion 202 (1940).
3. Short of disclosure, the lawyer may guard the school district's interest by giving conservative advice. (Advice tailored to protect the interests of the district).
4. Explicit action requiring a clear violation of the law would trigger the lawyer's option to withdraw.

G. SITUATIONS TO AVOID

1. Preparation of the employment contract. The attorney represents the Board. The Superintendent should obtain independent legal advice to review the employment contract.
2. Evaluation of the Superintendent.

The lawyer should protect the district's interest on the topic of evaluation, including notice, frequency and the criteria as it may appear in the employment contract.

3. Criticism policies or contract clauses. Consideration should be given to a policy or contract clause that provides for a process when there is criticism of the school administrator.

H. SCHOOL ADMINISTRATORS ARE REQUIRED TO COMPLY WITH THE STANDARDS FOR COMPETENT AND ETHICAL PERFORMANCE OF OREGON EDUCATORS (OAR 584-20-01, et seq.)

This includes the duties to demonstrate a commitment to recognize the worth and dignity of all persons, and use professional judgment, as well as demonstrating skills in communicating district and school goals to staff and public.

I. IF A DISPUTE DEVELOPS BETWEEN THE BOARD AND THE SUPERINTENDENT

1. Make clear to all parties the role of the school lawyer.
2. Carefully discuss alternatives to dismissal: reprimand, with or without notice that there is an opportunity to correct a condition; notice of unsatisfactory performance and an opportunity to correct the condition; defer action to the next evaluation.
3. Beware of publicity by board members of board member discussions and evaluations. This is the source of much litigation against school districts. There are frequent claims of violation of the liberty interest of the school board member by inappropriate board member comments.

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November 17, 1989